

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

76-1132

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P/S

**United States Court of Appeals
For the Second Circuit**

UNITED STATES OF AMERICA,

Appellee,

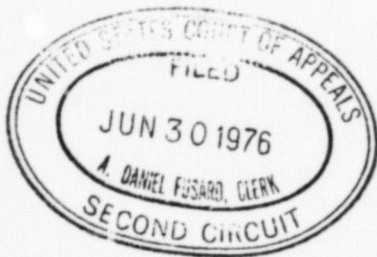
-against-

LAWRENCE IAROSHI, et al.,

Appellants.

*On Appeal From The United States District Court
For The Southern District of New York*

BRIEF FOR THE APPELLANT LEONARD RIZZO



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UNITED STATES OF AMERICA,

-against-

76-1132

LAWRENCE IAROSHI, et al.,

Appellants.

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BRIEF FOR THE APPELLANT LEONARD RIZZO

Preliminary Statement Pursuant to Rule 28(3)

Leonard Rizzo appeals from a judgment of the United States District Court for the Southern District of New York (Bonsal, J. and a jury) convicting him of conspiracy to distribute narcotic drugs (21 U.S.C. 812, 841(a)(1), 841(b)(1)(A), and of two counts of distributing narcotic drugs (21 U.S.C. 173, 174 and 21 U.S.C. 841) and sentencing him to concurrent terms of 5 years' imprisonment, followed by three-year terms of special parole.

Mr. Rizzo is at liberty upon a personal recognizance bond pending this appeal.

Questions Presented

1. Whether the convictions of the substantive counts (Counts 4 and 11) must be reversed for the government's failure to prove venue.
2. Whether the insufficient testimony before the grand jury warrants this Court in reversing the convictions under Counts 4 and 11 and dismissing those counts.
3. Whether the highly prejudicial testimony of Mary Mobley concerning threats to her life require reversal of the indictment.
4. Whether the variance between the pleading in Count 4 of the indictment and the proof at trial require reversal of the conviction under that count.

Statement of Facts

The Identification Hearing

Before commencement of the trial the appellant, Leonard Rizzo, moved to suppress any identification testimony by the witness, Mary Mobley, based upon a tainted, improper photographic identification. The trial court ordered an evidentiary hearing but, over objection, provided that the trial be commenced before the hearing started.

The first witness to testify at the hearing was Mary Mobley, the identifying witness. She testified that

she was arrested in 1971 and that thereafter she began cooperating with the government (H 72).^{*} In connection with her agreement to cooperate, she appeared at the United States Attorney's Office in the Southern District of New York, on four or five occasions between January and March of 1974. On each of those occasions she was shown arrays of photographs and she identified various persons depicted in them (H 74-6). Miss Mobley testified that the photographs she looked at depicted people who looked old, young, black, white, and Italian (H 75-6).

On one of those visits she was left alone in the prosecutor's office. While alone, she stated that she saw a stack of approximately 40 photographs on top of the desk (H 79-80). She had not been invited to look or examine the photographs but nevertheless took them and started looking through them (H 79-80). From that stack Miss Mobley testified that she identified a photograph of Leonard Rizzo (H 81).

^{*} References are to the transcript of the trial and hearing. Those numbers preceded by the letter "H" refer to the Hearing. All other references are to the Trial.

Upon cross-examination Miss Mobley said that some of the photographs in the stack were mug-shots (H 97). But she could not say, nor approximate, how many were mug-shots and how many were not (H 97). She did testify unequivocally, however, that the photograph of Leonard Rizzo was not a mug-shot, and that it showed a front view of the appellant as he was standing behind an automobile (H 98). She said that he had a moustache, long sideburns, and dark glasses (H 99-101).

Special Agent Arthur Carter of the Drug Enforcement Agency was the second witness. He said that he was the person who had obtained the photograph of the appellant that had been identified by Miss Mobley. It was a mug-shot of Leonard Rizzo, he testified, that had been obtained from the New Jersey Police, directly contradicting Miss Mobley's testimony (H 150-51, 157, 161).

The government was unable to produce the photograph that Miss Mobley identified, or the array from which it was taken (H 174-75).

The Government's Case

Mary Mobley was the principal witness against the appellant, Leonard Rizzo, and it was solely upon her testimony that the government and the grand jury based the substantive charges against him in Counts 4 and 11 of the indictment.* As of the date of her trial testimony, Miss Mobley, then 24 years old, had been arrested 21 times and had at least four previous convictions (28-9, 200, 202). Those convictions ranged from possession of heroin to burglary, forgery, and disturbing the peace (30-2, 201-05, 210). At least one of her arrested and convictions occurred while she was cooperating with the government in connection with the instant case, and while the government was paying her \$620.00 per month as part of the consideration for her cooperation (31, 205, 210, 211, 222). Moreover, on the date that she testified, Miss Mobley had three outstanding felony charges against her in Pennsylvania: two for forgery and one for armed robbery with a gun (32-4, 222, 224). Additionally, while the government was supporting her, Miss Mobley was admittedly stealing to support a drug habit which requires five to six doses per day (223). During the period that Miss Mobley was testifying

* The government conceded, however, that the substantive charges against appellant Leonard Rizzo were based solely on the testimony of Mary Mobley (1310, 1551, 1552).

before the grand jury in relation to this matter, in March of 1974, she was addicted to various narcotics including heroin, cocaine, morphine, and "dilaulid". She continued to be a drug user until April of 1975 (250-53, 255-56, 223, 199, 296, 310).

Miss Mobley testified on direct examination that in the summer of 1968, when she lived in Pittsburgh, Pennsylvania, she met a man named Alvin Clark on the street when he saw her and offered her a ride home. Clark immediately invited her to accompany him to New York, and she readily accepted without asking any questions. On that very first trip Miss Mobley, who had been in the drug business for some time already, learned that her function was to carry narcotics back from New York for Clark (34-8, 41, 230-32). She cooperated.

The witness seemed to be somewhat confused as to when she first met and accompanied Clark to New York, in order to bring heroin to Pittsburgh. On direct examination she stated unequivocally that it was in the summer of 1968 (34-8, 41). Upon cross-examination it was elicited that she had testified before the grand jury that she first met Clark in 1965 or 1966 and started making trips then. Miss Mobley attempted to explain the inconsistency by saying that she met Clark once in 1965 when she needed a quarter and approached a stranger, Mr. Clark, to ask him for one (233).

After the first trip to New York with Clark, Miss Mobley testified that she made approximately 10 similar trips to New York with him. Each time a package of heroin would be picked up at the airport in Queens or in Newark. She would keep the drugs in her personal possession until she and Clark arrived in Pittsburgh, and she would invariably steal some of the heroin before returning the package to Alvin Clark (47, 53, 57, 81). Miss Mobley also testified that on those trips she met various people at the airports (48), among them Lawrence Iarossi, whom she knew as "Big Lou", and Anthony Manfredonia, whom she knew as "Ralphie" (50-1, 57-60).

In the summer of 1970, according to the witness, she first met Graziano Rizzo, the appellant's brother, (whom she knew as "Juju") at the grand opening of Alvin Clark's restaurant in Pittsburgh (64, 293). At that time arrangements were made for her to receive narcotics in New York from Juju for Alvin Clark (65). Miss Mobley fixed the time of her first meeting with Juju as being the summer of 1970, because she remembered that the grand opening was in August of 1970 (64-5, 293-6). It was elicited on cross-examination, however, that in the grand jury she testified that she received narcotics from Juju in March, 1970, at least five months before she met him (295-967). In any event, Miss Mobley's trial testimony was that she picked

up packages of narcotics from Juju at various times, from 1970 to 1971 (67).

Mary Mobley's Testimony Concerning the Appellant, Leonard Rizzo.

Mary Mobley testified that approximately two weeks after she first met Juju she was introduced by Alvin Clark to the appellant Leonard Rizzo, at Clark's restaurant in Pittsburgh (69-70). She said that the purpose of the introduction was to arrange for her to pick up packages of narcotics from him in the future. She also stated that when they met, the two had an argument for three full hours because appellant allegedly had said to Clark, "who is this bitch?" (70, 81, 308).

Miss Mobley testified that a few weeks after meeting the appellant, she started flying to New York airports where she picked up narcotic packages from him (182). On direct examination she said that for the one-year period from 1970 to 1971, she met him, and was given heroin packages by him, "six or more" times (189, 303, 305). In the course of the entire hearings only one day earlier, however, she said that she had met him at the airport to receive narcotic packages "about 10, 15 times, maybe more" (86, 116). Miss Mobley added that on one of those occasions the appellant offered her One Thousand (\$1,000.00) Dollars if she would

"go to a hotel" with him (183-84). Of course, she refused, despite the fact that at that time she was stealing to support her heroin addiction and was "strung out" (309-10).

There was also testimony, over objection, by Miss Mobley concerning threats she said were made against her. Those threats were attributed by her to Lennie Rizzo. The evidence did not support that conclusion. Miss Mobley testified that in August, 1971, she had been told by Clark that he would no longer get narcotics from New York (185). Upon hearing that, she called Clark in order to secure his assistance in getting a package of heroin for herself. Clark complied, and made the call (186-87). Miss Mobley picked up the narcotics, and, after she "gave 1/2 of the package away" talked to Alvin Clark, telling him that she no longer had it because she had to get rid of it (187). Clark responded by saying that "Juju" wanted to talk to her. Thereafter, Clark picked up Mobley and telephoned Juju from a pay telephone (187). Miss Mobley testified that she hung up on Juju; that Clark called Juju back and had a conversation with him; and that subsequently Miss Mobley secretly put some narcotics in Mr. Clark's establishment, thereafter calling the police, and having him arrested (188-89). Upon cross examination, but over defense objections, she was allowed to say that her reason for taking the action was prompted by a threat from Clark to her, to the effect that he would

bring Lennie and Juju Rizzo "to her front door", because of her failure to pay for the narcotics (272-73). By framing Clark, she explained, he "wouldn't be around to bring them to my front door" (272-73).

Upon redirect examination by the prosecutor, Miss Mobley was asked a question concerning the purpose of her being in protective custody (354). Over vehement defense objection (354-58), she was permitted to expand greatly on the threats made to her by Clark and Juju and to implicate Leonard Rizzo in them on the basis of nothing said or done by him. She started by essentially repeating her testimony given on direct examination about the phone call to New York between Alvin Clark and Juju (360). She said that while she was listening in on the conversation Alvin Clark

" . . . talked to Juju . . . and he was telling Juju that I had to get rid of the package, and Juju was saying that he is not going for that" (362).

After she hung up, she testified that

" . . . Mr. Clark called him (Juju) back and I didn't hear the conversation" (362).

On the way home with Mr. Clark, she continued over more

defense objections, Clark told her that Juju (emphasis added) meant "to off me, to get rid of me" (363). It was after that, she repeated, that she planted the narcotics in Clark's

restaurant and had him arrested (363-64).

When asked why she had "set up" Clark, she replied, "so that he couldn't send Juju and Lenny to my front door" (364). This answer was given despite the absence upon direct examination, cross examination, or redirect examination that there was any indication that Leonard Rizzo was a party to any of the threats. When a limiting instruction was requested from the trial court, the error was compounded:

"THE COURT: I understand, ladies and gentlemen, that the only references here are to Juju and Lenny.

MR. STOKAMER: Objection, your Honor, there was no reference to Lenny. It was only to Juju.

THE COURT: Can you clear us upon that?

THE WITNESS: I was referring to Juju and Lenny." (364-65)

A motion for a mistrial was denied and the court advised the jury that further instruction would be given at a latter time but that the jury "should consider this testimony only with respect to Juju and Lenny. And Juju is not here on trial" (365).

Another motion for a mistrial was denied.

ANTHONY MANFREDONIA

The only other witness who mentioned the appellant was Anthony Manfredonia. Manfredonia had a long criminal history ranging from armed robbery, to heroin selling, to

confidence games (378-82). In 1975 Mr. Manfredonia was indicted in the indictment which was preceded by the indictment naming the defendants in the case on trial. He pleaded guilty to "old law" counts requiring a minimum ten-year sentence and allowing maximum terms of imprisonment of up to 40 years. After agreeing to testify, he withdrew his guilty plea without government objection and re-pleaded to "new law" counts requiring no minimum term of incarceration (375-76; 554-55).

Anthony Manfredonia testified that in 1967 he met the co-defendant Lawrence Iarossi and became associated with him in the heroin selling business in 1967 (389-90). Before that time he had other partners in the drug selling business for various periods of time. From 1967 to 1969, he testified, his principal source for heroin was Vinny Pappa at the Astoria Colts Club in Queens (391, 396, 415). His customers included co-defendant Snider Blanchard, Alvin Clark, Mary Mobley, and others (401).

In about February, 1970, Manfredonia testified that he stopped dealing in narcotics (430, 593). He stayed out of the business for a period of time, and started selling again in October or November when he was introduced to Joe Barone and was asked to help find a source for narcotics (430-32). When Manfredonia went to his old source of supply, the Astoria Colts Social Club,

he learned that Vinny Pappa was no longer there, and he was directed to another bar, Scott's Pub, where he spoke with Virgil Alessi, Vinny Pappa and Anthony Passaro (432). It was then that he started buying and selling heroin again, with Joseph Barone as his partner instead of Lawrence Iarossi (433-34). Manfredonia testified that alternate sources of supply were James Panebianco, a co-defendant at the trial, Graziano Rizzo, who was indicted in the instant case but who pleaded guilty, and Louis Inglese (440-46). In connection with his criminal enterprise, Manfredonia met Mary Mobley at Newark Airport on two occasions in the late part of 1971 (456). All together, he testified, he met her a total of three or four times (596).

MANFREDONIA'S TESTIMONY CONCERNING LEONARD RIZZO

Anthony Manfredonia testified at the trial to one transaction involving the appellant, Leonard Rizzo.* In early 1971 Manfredonia testified that he went to a social club looking for Graziano Rizzo (Juju), appellant's brother (466). The only one in the club when he entered was Leonard Rizzo (466).

* This was not the basis for the substantive counts as conceded by the prosecutor (1310, 1551-52).

He asked Leonard where his brother was and was asked what he wanted (466). When Manfredonia told Leonard that it was looking by Juju to get drugs, he said that Leonard offered to take care of it. Manfredonia testified that he ordered a quarter kilogram of heroin from Rizzo, and that it was delivered and paid for later that day (467-68).

Manfredonia was then asked if he saw Leonard Rizzo after that time, and he replied that he had seen him in the neighborhood (468). The next question and answer were the following:

"Q. Who was he with?

A. Mainly his brother."
(468).

There was no mention, or even any hint, of criminal behavior (468), except for the obvious association with Juju whose name appeared often in the government's case in many transactions.

Manfredonia testified that he never went to any airport with Juju Graziano to pass drugs to Mary Mobley and that he never went to any airport with Leonard Rizzo to pass drugs to Mary Mobley (599). Both of those statements squarely contradicted Miss Mobley's testimony (50-1, 59-60).

OTHER TESTIMONY ON THE GOVERNMENT'S CASE

The rest of the witnesses who were called by the government had nothing to say specifically relating to the appellant, Leonard Rizzo.

Thomas L. Murray, an unindicted co-conspirator, was called by the government and testified concerning his activities as a courier of drugs and money for Anthony Manfredonia and Joseph Barone (an indicted co-conspirator who pleaded guilty prior to the trial), and others (677-80).

Patrolman Charles Frisina testified that he and two fellow police officers, Patrolmen O'Rourke and DeLuca made a series of observations in Queens, in the vicinity of Scott's Pub bar, in June and July of 1971 (769-70; 772-74; 776-77; 778-79; 781; 783; 785; 787). Those observations, which included following a man from the bar to an apartment at 4601 39th Avenue (Apt. 106) culminated in the arrest of four persons on July 8, 1971, and the seizure of a large amount of heroin, dilutants and paraphernalia from that apartment (790-95; 800-06). The four persons arrested, Louis LeSerra, Sandra LeSerra, John D'Amato, and Frank D'Amato (790-93; 795), were not on trial as defendants, nor were they charged as defendants in the indictment.

In addition to Patrolman O'Rourke, Patrolman DeLuca (826-33) and Patrolman O'Rourke (833-36) also testified.

Another police officer, Thomas Houston, testified that from February until June of 1971, he saw the two D'Amato brothers and Virgil Alessi at Scott's Pub on various occasions (840-41). Officer Houston had no testimony specifically relating to any of the named defendants on trial.

Ralph Nieves, an undercover New York City Police Officer, testified that he purchased heroin from a person named Collin Carroll in late 1972 and early 1973 at a service station in the Bronx (847-50). On the last occasion, February 6, 1973, he observed Collin Carroll and his heroin supplier, a person named Nevado, engaged in a conversation with the defendant Renato Croce, and Graziano (Juju) Rizzo. Shortly thereafter, Croce and Rizzo left the service station together (850-51).

Detective Arthur Drucker, another New York City Detective, testified that he saw Renato Croce and Graziano Rizzo on January 16, 1973, and that they removed a manilla folder from the trunk of their car before proceeding into Mr. Croce's residence (870-71). He saw them on another occasion, January 31, 1973, at Mr. Nevado's residence (871-72). Detective Drucker also testified that on February 6, 1973, he arrested Graziano Rizzo and Renato Croce after finding heroin in Graziano Rizzo's automobile (874-76).

Arthur Carter, a special agent for the Drug Enforcement Agency, testified that on March 7, 1972, he observed a confidential informer in conversation with Joseph Barone, then known to the agent as "Frankie" (1018-19); that on March 20, 1972, with the assistance of the same informer, he discussed the purchase of heroin from Joseph Barone, and Thomas Murray (1019-23); that on March 25, 1972, he purchased heroin from Barone through the informer (1023-26); and on another occasion from Joseph Barone and Patsy Anatola (1059-61); Agent Carter also testified that on April 25, 1972, he purchased heroin from Fiore Rizzo through the informer (1045-49). When asked by the prosecutor if he knew who Fiore Rizzo was, the agent replied that he was the uncle of Graziano and the appellant, Leonard Rizzo. A request for cautionary instructions to the jury was denied at that time (1053).

THE DEFENDANT LEONARD RIZZO'S CASE

Leonard Rizzo testified to his innocence. After having served in the United States Navy and receiving an honorable discharge, he went to work for a firm in New York, the Washburn Wire Company (1363-64). Shortly thereafter, in 1963, Mr. Rizzo married and he and his wife lived in Manhattan. He kept his position at the wire company until 1967 when they moved to Connecticut because of his wife's desire not to remain in New York (1365, 1367-69). By that time the Rizzo's had two children (1369).

Mrs. Rizzo did not like Connecticut and longed to return home, so after living there for less than a year, the Rizzo's moved back to New York, staying with his wife's parents in Huntington, Long Island, before they separated, and ultimately divorced (137-73).

In 1970, Mr. Rizzo and his father opened a retail fruit and vegetable stand in Manhattan, but the venture lasted only slightly less than a year before they had to close (1377-79). Always a worker and never remaining unemployed, Mr. Rizzo got a job at a delicatessen, subsequently meeting his present wife, Marianne Rizzo, in the Fall of 1971 (1380). The couple were married on July 8, 1972 (1381).

After marrying Mr. Rizzo and his wife purchased a home in Toms River, New Jersey, and Mr. Rizzo secured

employment there as a licensed real estate salesman (1381-83). The cost of the house was \$29,500.00. A deposit of \$4,800 was paid -- furnished mainly from his wife's savings -- and the balance paid at a rate of \$229.00 per month on a mortgage (1384-85).

Mr. Rizzo unequivocally denied that he ever met Mary Mobley at any airport, or that he had ever gone to Pittsburgh (1387, 1404-05). When asked if he had ever met Mary Mobley anywhere, he said that he was unsure. He explained that in the Summer of 1971, he was going to a baseball game with his brother, Graziano Rizzo (1387-88). On the way to Shea Stadium, his brother indicated that he had to make a "stop" and he went into Howard Johnson's Restaurant on Queens Boulevard, close to the stadium (1388-89). Upon entering, Graziano introduced Leonard to a young black couple, apparently man and wife (1389, 1407-08). Graziano and the man walked away for approximately 10 minutes, leaving Leonard and the woman at the table, talking (1389-91). When the man returned, Graziano and Leonard left the restaurant and proceeded to the baseball game (1391). Although Mr. Rizzo could not be certain that the young lady he met at the restaurant, five years earlier, was Mary Mobley, he thought that it was (1390).

Leonard also stated that he had met Manfredonia at his brother Graziano's house, and that Leonard visited

Graziano's house often (1394, 1405). After Leonard's arrest, Manfredonia, also arrested, met Leonard in West Street and reminded him of the meeting (1394). Mr. Rizzo testified that he had no previous conviction or arrests with the exception of one driving infraction (1394-95).

Marianne Rizzo, Leonard's wife, was called as a witness for the defense. She testified that they were married on July 8, 1972 (1347); that she had been employed as a full-time waitress for 14 years (1350); and that Leonard Rizzo had always contributed to the support of the family. She was prevented from corroborating her husband's testimony concerning the purchase of the home and the source of the funds (1349), how he had been supporting the family (1351-54), and how he spent his funds (1355). Mrs. Rizzo had never been convicted of any crime, nor had she ever been arrested (1356).

POINT I

THE GOVERNMENT'S FAILURE TO PROVE VENUE AND THE COURT'S FAILURE TO ADEQUATELY CHARGE THE JURY CONCERNING THE GOVERNMENT'S BURDEN OF PROVING VENUE REQUIRE REVERSAL OF THE CONVICTIONS UNDER COUNTS 4 AND 11 OF THE INDICMENT.

Article III, Section 2, and the Sixth Amendment to the United States Constitution guarantee that every accused shall have the right to a jury trial in the district "wherein the crime shall have been committed". Also, see Fed. R. Cr. P., 18. The right to be tried in the proper district is, and has been, recognized to be an important one. United States v. Rodriguez, 465 F.2d 5, 9 (2nd Cir. 1972). In United States v. Johnson, 323 U.S. 273, 275 (1944), Mr. Justice Frankfurter, writing for the majority of the Court, said:

"Questions of venue in criminal cases . . . are not merely matters of formal procedure. They raise deep issues of public policy."

Because venue was not proven, the conviction of appellant on Counts 4 and 11 must be reversed. Leonard Rizzo was charged with two substantive violations in addition to the conspiracy charged in Count of the indictment. Count 4 of the indictment charged Mr. Rizzo, under the "old law" (21 U.S.C. 173, 174) with the knowing receipt, concealment, and facilitation of transportation of one kilogram of heroin, in the Southern District of

New York, in April, 1970. Count 11 of the indictment charged Mr. Rizzo under the "new law" (21 U.S.C. 812, 841 (a)(1), 341(b)(1)(A) with the distribution of one-half kilogram of heroin, in the Southern District of New York, in July, 1971. The government concedes that the only witness who testified about these alleged violations was Mary Mobley (1310, 1551-52).

Mary Mobley testified that she met the defendant, Leonard Rizzo, on various occasions from 1970 until 1971. Her testimony was that the first time they met, they were in Pittsburgh, Pennsylvania. Subsequent meetings all took place in Kennedy Airport, LaGuardia Airport, or Newark Airport. It was at those airports, she alleged, that Mr. Rizzo gave her heroin, which she immediately took to Pittsburgh. Since all of the alleged meetings and transactions were outside of the District, venue was not proven. United States v. Mancino, 179 F. Supp. 897 (S.D.N.Y. 1960). Furthermore, the trial court erred in failing to properly instruct the jury concerning the government's burden of proof of venue, despite timely request by the defendant. Green v. United States, 309 F.2d 852 (5th Cir. 1962). For those reasons the conviction on the two substantive counts must be reversed.

At the close of the government's case, and again at the close of all of the testimony, Leonard Rizzo moved

to dismiss Counts 4 and 11 upon grounds of improper venue. In response to the defendant Rizzo's arguments, the government argued below that the crimes charged in Count 4 (21 U.S.C. 173, 174, the "old law" count), and Count 11 (21 U.S.C. 812, 841, the "new law" count) are "continuing crimes" within the meaning of 18 U.S.C. 3237. The government further argued that the evidence adduced at trial -- specifically, the testimony that Leonard Rizzo lived in the Bronx -- allowed an inference that the narcotics which were delivered outside of the Southern District were carried through the Southern District (1293-94). Both of the government's contentions are without merit.

The "continuing crime" doctrine, as defined in 18 U.S.C. 3237 provides a choice of districts to try offenses that are "begun in one district and completed in another, or committed in more than one district" (18 U.S.C. 3237). If a crime is a continuing one, the trial may be had in any district where the offense was "begun, continued or completed". (18 U.S.C. 3237). The type of offense contemplated by the "continuing crime" section is one that by its nature involves movement or conduct occurring in more than one place. United States v. Midstate Horticultural Co., 306 U.S. 161, 166 (1939);

Davis v. United States, 364 U.S. 631 (1961); Rule 18, Fed. R. Cr. P.; United States v. Mancino, supra, 179 F. Supp. 897.

In determining whether a specific crime is a "continuing" or "single act" crime, an analysis should be made both of the nature of the crime charged, and of the factual nature of the offense charged. United States v. Rodriguez, 465 F.2d 5, 10-11 (2nd Cir. 1972); United States v. Sweig, 316 F. Supp. 1148, 1159-62 (D.C.N.Y. 1970), aff'd, 441 F.2d 114 (1971), cert. den. 403 U.S. Under these standards, the only proper place to try Counts 4 and 11 were the Eastern District of New Jersey. The government's argument that Leonard Rizzo's testimony that he lived in the Bronx is sufficient to provide venue in the district, is meritless. That testimony does not allow any inference that the narcotic transfers to Mary Mobley were "begun, continued or completed" in the Southern District. At most they allow speculation that Leonard Rizzo started from his home some time before going to the airport. Even that, or other acts of preparation, however, would not render the crimes "continuing" to allow prosecution within the Southern District. Preparations, even essential ones, do not afford sufficient basis for venue in the District where they were done. United States v. Sweig, supra, at 316 F. Supp. 1160. And the government's

argument that the narcotics must have been taken from the Southern District to the airports (1294) has absolutely no basis in this trial record. See, United States v. Masiello, 235F.2d 279, 289 (2nd Cir. 1956), cert. den. 352 U.S. 886 (1956). In order for an inference to be drawn, there must be some evidentiary fact established that allows that inference to be drawn. The appellant's residence in the Bronx is insufficient. The substantial charges had no connection with the Southern District of New York. They were committed outside of the District and to allow prosecution in the Southern District under the circumstances of this case would, in the words of Judge Frankel,

"imply expansive notions of venue that cannot be squared with the essential premises underlying the Constitution's confinement of federal criminal trials to the State and district where the wrongs allegedly occurred."

United States v. Sweig, supra, 316 F. Supp. at 1160. Also, see United States v. Mancino, supra, 179 F. Supp. 897.

Furthermore, the defendant Rizzo's request to charge concerning the government burden of proof of venue was denied (1496). The jury was not instructed that the government was required to prove venue beyond a fair preponderance of the credible evidence (see Court's Charge,

pp. 1744, 1768), and the defendant Rizzo's exception taken at the close of the charge was similarly denied (1802). Accordingly, since the jury was not advised of the government's burden of proof concerning venue, the convictions of Leonard Rizzo under Counts 4 and 11, must be reversed. United States v. Powell, 498 F.2d 890, 891 (9th Cir. 1974), cert. den. 419 U.S. 866 (1975); United States v. Provoo, 215 F.2d 531 (2nd Cir. 1954).

POINT II

THERE WAS INSUFFICIENT TESTIMONY BEFORE THE GRAND
JURY TO ALLOW INDICTMENT OF THE APPELLANT ON
COUNTS 4 AND 11.

In the course of her testimony before the grand jury, Mary Mobley testified that on various occasions she received packages from the appellant, Leonard Rizzo, at airports in the New York City area which were all concededly located outside of the Southern District of New York. Anthony Manfredonia did not testify that he ever met or had any transactions with the appellant within the Southern District.* At the close of the government's case, the motion to dismiss Counts 4 and 11 on that basis was denied. The denial was error. Costello v. United States, 350 U.S. 359, 364 (1956); Hale v. Henkel, 201 U.S. 43, 65 (1906); United States v. Estepa, 471 F.2d 1132, 1136 (2nd Cir. 1972).

Since the record clearly showed that the indictment improperly charged that the substantive charges were committed in the Southern District, those

* The grand jury testimony was made available to counsel at the trial in accordance with 18 U.S.C. 3500, but was required to be returned directly after the witness completed his or her testimony. Accordingly, there are no page references.

charges should be dismissed because the grand jury had no evidence upon which to base its charge. Costello v. United States, supra, 350 U.S. at 364.

Of course, the fact that Count 1, the conspiracy count, was properly charged as having been committed in the Southern District does not remedy the deficiency in the indictment concerning Counts 4 and 11, because each count in the indictment must be considered as an independent indictment. Gaither v. United States, 413 F.2d 1061 (C.A.D.C. 1969); United States v. Daneals, 370 F.Supp. 1289 (W.D.N.Y. 1974). Counts 4 and 11, therefore, should be dismissed.

POINT III

THE HIGHLY PREJUDICIAL TESTIMONY CONCERNING THREATS
TO MARY MOBLEY WERE IMPROPERLY ADMITTED IN EVIDENCE.

To be relevant and admissible, evidence being adduced must be "of consequence to the determination of the action" and must relate to probability of the existence of a fact to be proved in the case. Fed. R. Evid., 401. And, even relevant evidence may be excluded if its probative value is outweighed by the danger of unfairly prejudicing the defendant. Fed. R. Evid., 403; United States v. Malizia, 503 F.2d 578 (2nd Cir. 1974), cert. den. 420 U.S. 912 (1975); United States v. Polizzi, 500 F.2d 856, 894-96 (9th Cir. 1974). In this case, evidence of a highly prejudicial nature -- threats to a witness -- were admitted without cautionary instructions. The testimony was not relevant to any issue at the trial. Even if it could be considered relevant, any slight probative value that the testimony may have had was far outweighed by its tending to unfairly prejudicing the appellant, Leonard Rizzo. For that reason it should have been excluded.

Mary Mobley was permitted to testify, over objection, that she had been given protective custody because of an incident which involved herself, Alvin

Clark, and Juju. None of those three persons were defendants at the trial, and that inflammatory testimony which was not probative of any issue at the trial, was unfairly admitted against the appellant, Leonard Rizzo. The trial court should have excluded it, or at the very least, it should have given the jury cautionary instructions. Fed. R. Evid., 401, 403; United States v. Sciolino, 505 F.2d 586 (2nd Cir. 1974).

Any threat that may have been made to Miss Mobley was made by Juju, not the appellant (362). In the telephone conversation between Juju and Clark it was Juju who said that he would "get rid" of her (363). Moreover, the conversation wherein those threats were made took place among Clark, Mobley, and Juju; Leonard Rizzo was not a party (362-64). By allowing Miss Mobley to testify that she took the threat made by Juju and Clark as coming from Lenny and Juju (365) without any evidentiary basis and without cautionary instructions to the jury as requested by counsel, was unfair, and irreparable prejudice to the appellant occurred. Testimony such as that, predicated on fear is so prejudicial that it should be excluded in the absence of exceptional circumstances. United States v. Malizia, 503 F.2d 573, 581 (2nd Cir. 1974). As Professor Wigmore stated in his treatise (1 Wigmore Evidence, Sec. 57 at

p. 456 (3d. Ed. 1940):

"The deep tendency of human nature to punish, not because our victim is guilty this time, but because he is a bad man and may as well be condemned now that he is caught is a tendency which cannot fail to operate with any jury, in or out of court."

Accordingly, the conviction of Leonard Rizzo should be reversed.

COUNT IV

THE VARIANCE BETWEEN COUNT 4 AND THE PROOF AT TRIAL AMOUNTED TO AN IMPERMISSIBLE AMENDMENT REQUIRING REVERSAL OF THE CONVICTION.

Since an indictment is an action by the grand jury returned under oath, neither the prosecutor nor the Court may change the charge as set forth by the Grand Jury. Ex parte Bain, 121 U.S. 1 (1867); Russell v. United States, 369 U.S. 749, 770-71 (1962). Indeed, the federal courts adhere to the rule that an indictment may not even be amended, and the rule against amendment applies not only to formal attempts to amend, but also to submission of the case to the jury in a form different from that charged in the indictment. Stirone v. United States, 361 U.S. 212 (1960); United States v. Alaimo, 297 F.2d 604 (3rd Cir. 1961), cert. den. 369 U.S. 817. In this case the form that Count 4 of the indictment was submitted to the jury amounted to an impermissible amendment, and, therefore, the conviction upon that count should be reversed. Stirone v. United States, supra.

The indictment alleged that in April, 1970, Leonard Rizzo and Graziano Rizzo received, concealed and facilitated the transportation of one kilogram of heroin. The government points to the testimony of Gary Mobley for the evidentiary support for the charge.

However, at the trial Miss Mobley never referred to any narcotic transaction referring to both Leonard and Graziano Rizzo, and it was the government's argument that the charge was proved by the testimony that Leonard Rizzo gave Mary Mobley narcotics at various airports in 1970 and in 1971. However, Miss Mobley testified directly and unambiguously that she never met Leonard Rizzo until sometime in the summer of 1970. Moreover, she was able to fix that time by her recollection that she met Leonard Rizzo for the first time after the grand opening of a restaurant owned by Alvin Clark. The date of that grand opening was fixed by her as August, 1970. So it is clear that any transaction that she may have had with Leonard Rizzo could not have occurred until the second week in August, 1970, at the earliest. Since the indictment alleged a transaction in April, 1970, at least four months before Miss Mobley was even aware of the existence of Leonard Rizzo, the conviction upon Count 4 must be reversed since the government may not prove commission of offenses on dates other than those listed in the indictment. To do so would amount to permitting an amendment of the grand jury's indictment. United States v. Stirone, *supra*, 361 U.S. 212; United States v. Critchley, 353 F.2d 358, 362-63 (3rd Cir. 1965).

Moreover, the form in which the crime is charged in Count 4 -- that Graziano and Leonard Rizzo received one kilogram of heroin -- differs so much from the testimony -- that unknown quantities of heroin, never in full kilogram weights, were given to Miss Mobley by Leonard Rizzo without any participation on the part of Graziano -- warrants reversal of that count.

POINT V

PURSUANT TO RULE 28(1) OF THE FEDERAL RULES OF APPELLATE
PROCEDURE, APPELLANT LEONARD RIZZO HEREBY ADOPTS BY
REFERENCE THE ARGUMENTS OF OTHER APPELLANTS INSOFAR AS
THEY MAY BE APPLICABLE.

CONCLUSION

For the reasons stated above, the judgment of
the District Court should be reversed and the case
should be remanded to the District Court with a direction
that the indictment be dismissed, or that in the
alternative the appellant be granted a new trial.

Respectfully submitted,

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Dated: June, 1976.

STOKAMER

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 30 day of June, 19 76 at No. 1 X St. Andrews Pl. NYC deponent served the within Brief upon U.S. Atty. So. Dist. of NY 3 the Appellee herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 30 day of June 19 76

Edward Bailey
.....
Edward Bailey

William Bailey
.....
WILLIAM BAILEY

Notary Public, State of New York
No. 43-0132945

Qualified in Richmond County
Commission Expires March 30, ~~1975~~ 1977